Court File No. CV-22-00681184-00CP

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TYRON RICHARD AND ALEXIS GARCIA PAEZ

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF DEFENCE

A. ADMISSIONS AND DENIALS

1. Except where expressly admitted herein, the defendant denies the allegations made in the statement of claim and puts the plaintiffs to the strict proof thereof.

2. The defendant (Canada) admits the allegations contained in paragraphs 5, 13, 14 (2nd sentence), 15, 19, 21, 23 (1st and 2nd sentences), 24 (1st and 2nd sentences), 25 (1st sentence), 27 (2nd and 3rd sentences), 50 (1st sentence), 70, 71, and 80(c) of the statement of claim.

3. The defendant has no knowledge of the allegations contained in paragraphs 7, 8 (last sentence), 9 (1st sentence), 56 - 58, and 64 of the statement of claim.

4. The defendant does not plead to the statements contained in paragraphs 1, 12, and 119 of the statement of claim.

B. THE PARTIES

1) The Defendant

5. The Attorney General of Canada defends this action on behalf of His Majesty the King in Right of Canada (Canada) who is, pursuant to sections 3, 20 and 23 of the *Crown Liability and Proceedings Act*, responsible for actions committed by His servants, when they act in their official capacities, in good faith and within the scope of their employment.

6. The Canada Border Services Agency (CBSA) is responsible for providing integrated border services that manage access to Canada, and support national security and public safety priorities. The CBSA is also responsible for the removal from Canada of persons who are inadmissible to Canada under the provisions of the *Immigration and Refugee Protection Act* ("*IRPA*"), thus contributing to maintaining the integrity of Canada's borders. The CBSA is not responsible for the establishment, maintenance or management of provincial or territorial correctional facilities, nor is it responsible for provincial or territorial public health protocols. The CBSA also does not have the statutory authority to order that detainees undergo mental health assessments, regardless of where they are detained.

7. The CBSA is headed by a President, who reports to the Minister of Public Safety. The CBSA President is supported by an Executive Vice-President, several Vice-Presidents, as well as CBSA Directors and Directors General who report to the CBSA Vice-Presidents. The Detentions Unit, Immigration Enforcement Program Management

Division within the Enforcement Directorate is responsible for making policy decisions related to immigration detention.

8. The CBSA also has legal authority to arrest, detain and determine the location of detention of non-citizens in certain circumstances. In some situations, through a variety of legal instruments and under various legal authorities, the CBSA engages with municipal, provincial or territorial authorities to house persons detained on immigration grounds.

2) <u>Tyron Richard</u>

9. Tyron Richard has been in Canada since he arrived as a minor with permanent resident status in 2003. His criminal convictions in Canada include assault, possession of a weapon for a dangerous purpose, possession of property obtained by crime, break and enter and failure to comply with a condition of his recognizance.

10. He was ordered deported from Canada after failing to appear at a hearing to determine whether he was inadmissible to Canada as a result of his criminality. In 2014, he failed to appear at another hearing to review the stay of his deportation order. He lost his permanent resident status and a warrant was issued for his arrest. Mr. Richard was arrested and detained in January 2015 as unlikely to appear for his removal from Canada. He was also detained in Ontario correctional facilities at times prior to January 2015, pursuant to the *Criminal Code.*

11. Mr. Richard was detained on immigration grounds at Maplehurst Correctional Complex, Central East Correctional Centre and Toronto East Detention Centre between

January 2015 until July 2016, when he was released by the Immigration Division of the Immigration and Refugee Board under the supervision of the Toronto Bail Program. While detained, he refused to sign an application for a travel document, which would have facilitated his removal from Canada. He became a permanent resident of Canada in September 2020 after being exempted, on humanitarian and compassionate grounds, from the consequences of his past criminality.

3) <u>Alexis Garcia Paez</u>

12. Alexis Garcia Paez arrived in Canada as a visitor in January 2019. His claim for refugee status in Canada was initially refused in July 2021. After failing to appear at an interview with the CBSA in September 2021, a warrant was issued under the *IRPA* for his arrest.

13. Mr. Garcia Paez was detained pursuant to charges under the *Criminal Code* in September 2021 at the Toronto South Detention Centre. Though he was released from court hold on October 8, 2021, Mr. Garcia Paez faced outstanding charges for assault, assault causing bodily harm and failure to comply and so remained in detention at the same facility, but on immigration grounds. He was determined to be unlikely to appear for his removal from Canada and not suitable to be detained at a less secure facility (an Immigration Holding Centre) because of his criminal charges.

14. Within days of being detained on immigration grounds, the CBSA referred Mr. Garcia Paez to the Toronto Bail Program, an alternative to detention supervision program. The Toronto Bail Program agreed to supervise Mr. Garcia Paez on October 21, 2021. That same day, the CBSA proposed an alternative to detention and the Immigration Division

ordered Mr. Garcia Paez released to the Toronto Bail Program. He was found to be a Convention refugee on January 28, 2022.

C. THE DETENTION SCHEME UNDER DIVISION 6 OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

15. In certain circumstances, the CBSA can arrest individuals under the *IRPA*. The *IRPA* also permits detention by the CBSA or the Immigration Division.

16. The Immigration Division is a quasi-judicial tribunal that operates independently of the CBSA. The Immigration Division is mandated by the *IRPA* to conduct detention reviews for persons detained pursuant to the *IRPA*.

17. One or more of the following may constitute grounds for detention of an individual:

(a) They are inadmissible to Canada; and,

(i) a danger to the public; and/or

(ii) unlikely to appear for examination, an admissibility hearing or removal from Canada; or,

(b) An officer is not satisfied of the identity of the foreign national in the course of any procedure under the *IRPA*.

18. Within 48 hours after a non-citizen is taken into detention, or without delay afterward, the *IRPA* requires that individuals be brought before the Immigration Division for a hearing to review their detention.

19. If detention is ordered to continue by the Immigration Division after the first detention review, regular detention reviews by the Immigration Division are required pursuant to the *IRPA* within the next 7 days and within every 30 days thereafter.

20. The arrest and detention provisions under the *IRPA* advance preventive and administrative objectives, related to the safety of the public and the effective enforcement of the *IRPA*. The CBSA enforcement manual on detention is clear that these provisions do not have a punitive objective. The *IRPA*, the *Immigration and Refugee Protection Regulations* (*Regulations*) and the CBSA's policies and procedures protect against indefinite detention.

21. If one or more grounds for detention are established, the following non-exhaustive factors set out in section 248 of the *Regulations* must be considered to determine whether the individual should be released or detained (or have their detention continue):

(a) The reasons for the individual's detention;

(b) The length of time the individual has been in immigration detention;

(c) Whether the length of time that detention is likely to continue can be determined, and if so how long detention is likely to continue;

(d) Unexplained delays or unexplained lack of diligence on the part of the Minister or the person detained; and

(e) The existence of alternatives to detention.

22. The conditions of detention can also be considered in the assessment of whether detention should continue or not.

23. The number of individuals detained under the *IRPA* is a very small proportion of non-citizens entering, and in Canada. The overwhelming majority of non-citizens awaiting removal, an examination, or an admissibility hearing, are not detained.

D. ALTERNATIVES TO DETENTION

24. Where there are adequate alternatives to detention, an individual should not be detained. A number of alternatives to detention are available including release on conditions. Conditions of release can be imposed to mitigate any risks arising from a foreign national or permanent resident residing in the community, including any danger to the public. Conditions can also be imposed to mitigate any risk that an individual will not appear for an immigration process, including complying with an order to leave Canada. Alternatives include voice reporting, in person reporting, the payment of a deposit or the posting of a guarantee, residing at a specific address, electronic monitoring, community case management, and/or abiding by a curfew.

25. The appropriateness of these alternatives can only be assessed on an individual basis. The decision to release an individual on conditions includes consideration of a wide variety of factors that will vary based on all of the individual circumstances surrounding the detention.

E. PLACE OF DETENTION

26. Generally, individuals detained on immigration grounds are held at a CBSA-run Immigration Holding Centre (IHC) or in correctional facilities maintained and operated by municipal, provincial or territorial authorities (“correctional facilities”). The place of

detention depends on the geographical location of the individual, proximity to an IHC, and an assessment of the individual's risk level.

27. To determine the location of detention, the CBSA routinely applies objective criteria to assess an individual's risk factors, vulnerability factors and suitability for detention at an IHC.

1) Immigration Holding Centres

28. The CBSA operates three immigration detention facilities: in Toronto, Ontario, Laval, Quebec and Surrey, British Columbia. These facilities house individuals from across the country who are subject to detention and meet the admission criteria. Capacity at the three IHCs has varied during the class period. Currently, the three IHCs combined have a collective maximum capacity of 439 detainees. All of these facilities were initially used for detainees assessed as lower risk only. As discussed below, over time, admissibility criteria and IHC capacity to accommodate detainees in certain circumstances have changed in some IHCs.

29. CBSA policies, as amended from time to time, generally provide that any detainee assessed as a potential threat to themselves or to other detainees or to the public is not eligible for detention at an IHC. Historically, detainees who are fugitives or who present escape risks, who have a history of violence or display violent or uncooperative behaviour, or who have serious medical issues were to be detained in a more secure facility. The CBSA relies on the provinces and territories to provide more secure facilities, higher levels of medical care and supervision, and to house detainees in areas where IHCs do not exist.

30. Individuals can be transferred to an IHC from correctional facilities when their risk can be appropriately managed within an IHC.

31. By 2018, nursing and medical care staff availability had been increased at all three IHCs: nursing staff are on site 24 hours, a doctor and psychologist provide regular service to detainees, and a psychiatrist is on call as required.

a) The Toronto IHC

32. The Toronto IHC became operational in March 2004. Between 1992 and 2004, a re-purposed hotel in Toronto was used as an immigration holding centre.

33. From the start of the proposed class period until May 15, 2017, the Toronto IHC was intended to house only low risk detainees. CBSA policies, as amended from time to time, generally provided that any detainee assessed as a potential threat to themselves or to others is not eligible for detention at an IHC. In addition, detainees who are fugitives or who present escape risks, who have a history of violence or display violent or uncooperative behaviour, are to be detained in a more secure facility. These policies reflect the terms of the insurance policy for the Toronto IHC at the time, as well as the incompatibility between the security measures required for those individuals and the less restrictive conditions of detention at the Toronto IHC.

34. Since May 15, 2017, following an amendment to the insurance policy, the Toronto IHC has been able to accommodate detainees who are assessed to be medium risk. Medium risk detainees include persons who may have prior criminal convictions but whose convictions do not relate to weapons offences, the trafficking, import or export of

a controlled substance under the *Controlled Drugs and Substances Act*, or sexual assault or related sexual offences. Medium risk detainees exclude persons with a record of violence.

b) Quebec IHC

35. The CBSA has operated an IHC in Quebec since 1996. The current Quebec IHC opened in Laval, Quebec in October 2022. It can accommodate 152 individuals presenting low to medium risk factors. Individuals presenting high risk or violent behaviours are redirected to provincial correctional facilities.

36. The previous Quebec IHC was located in a building formerly owned by Correctional Services Canada. It accommodated the same risk levels as the current IHC in Quebec.

c) British Columbia IHC

37. The CBSA operated a small, short-term, low-risk immigration holding facility in the Vancouver International Airport that accommodated 24 individuals for detentions of under 72 hours. As of 2020, a new IHC was opened in Surrey, British Columbia which accommodates 70 individuals. It can accommodate individuals presenting with low to medium risk behaviours with those with higher risk or violent behaviours being redirected to provincial correctional facilities.

2) <u>Provincial and territorial correctional facilities</u>

38. Canada has entered into written agreements with Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, and Quebec, to use their respective correctional remand

facilities for *IRPA* detainees. These agreements are signed by the appropriate federal Ministers or their deputies, CBSA Directors-Generals, or more senior CBSA executives.

39. The specific terms of the agreements vary, but in general terms the agreements concern:

(a) Remuneration paid to the custodial jurisdiction for each detainee housed in their correctional facilities;

(b) The choice of the specific correctional facility at which an immigration detainee is to be held;

(c) Minimizing, to the extent possible, commingling between immigration and non-immigration detainees;

(d) Canada's ability to monitor the conditions of detention and correctional facility access for individuals responsible for monitoring, upon reasonable notice;

(e) The applicable provincial or territorial statutes, regulations, policies and procedures governing conditions of detention for immigration detainees;

(f) Canada's payment for detainees' required medical expenses and treatment not covered under provincial or territorial health care plans;

(g) Sharing information about detainees' medical needs in the event of an emergency and when custody of the detainees shifts between the parties; and,

(h) The process for the resolution of any conflicts that may arise between the parties.

40. The provinces of Alberta, British Columbia and Nova Scotia have announced that they will terminate their written agreements to hold immigration detainees.

41. During the proposed class period, Manitoba, Newfoundland and Labrador, the Northwest Territories, Prince Edward Island, Saskatchewan and the Yukon have housed immigration detainees in their correctional facilities pursuant to long-standing

arrangements that follow similar principles, but are not captured in writing. Manitoba has announced that it will stop housing immigration detainees on January 1, 2024.

42. In each of the provinces and territories, there are a varying number of correctional facilities that are available to house immigration detainees. Since the beginning of the proposed class period, CBSA has used 86 correctional facilities across the country for immigration detention.

F. REVIEW OF IMMIGRATION DETENTION

1) Immigration Division

43. During a detention review before the Immigration Division, both parties are given an opportunity to submit evidence and make submissions. An individual who is detained may, at their own expense, be represented by legal or other counsel, or may represent themselves. Detained individuals can present proposals for release at their detention reviews. The Immigration Division is also authorized by the *IRPA* to appoint a designated representative for any individual who is under the age of 18 or who is unable to appreciate the nature of the detention review proceedings.

44. At each detention review, the presiding Member must release the person concerned from detention unless he or she is satisfied that there are one or more statutory grounds for detention. The Immigration Division can order unconditional release, release with conditions or continued detention.

45. If one or more grounds for detention are established, the Immigration Division must consider the non-exhaustive factors set out in the *Regulations* as well as conditions of detention, when determining whether continued detention is appropriate.

46. The Immigration Division is a tribunal of competent jurisdiction to hear and decide *Charter* issues and remedy unjustifiable violations of the *Charter* under section 24(1) of the *Charter* (including ordering release) in line with its statutory mandate. Decisions of the Immigration Division are reviewable by the Federal Court by way of judicial review. Detention orders made by the Immigration Division can also be challenged by bringing an application for *habeas corpus*.

47. Every proposed Class and Subclass member was detained in accordance with the *IRPA* and had the benefit of regular detention reviews before the Immigration Division.

2) <u>CBSA's Review of Detention</u>

a) The initial detention decision

48. CBSA officers making the initial decision to detain and deciding on the location of detention are guided by the CBSA's policies and procedures, including an enforcement manual and operational bulletins relating specifically to detention.

49. The CBSA has the legal authority to make appropriate and reasonable arrangements to effect detentions. It does so by considering the particular situation of the individual in question, the location, and surrounding circumstances. The CBSA is responsible for making arrangements for the safe and secure detention of those who meet the statutory criteria for detention, while also considering the well-being and safety of the

detainee in question, other detainees, and the broader public, taking into account the particular location and circumstances at issue at that time.

50. If a CBSA officer exercises his or her discretion to detain an individual, their decision to detain is subsequently reviewed (before the first review by the Immigration Division) by a CBSA Supervisor or Manager for all inland cases or a Superintendent for all port of entry cases. Following this review, release may be ordered or detention may be maintained. This review includes a review of all individual factors and circumstances that were considered in the original detention placement decision.

51. A CBSA officer may also order the release of a detainee in advance of the first detention review before the Immigration Division if the officer is of the opinion that the reasons for detention no longer exist. Once an individual is before the Immigration Division, the CBSA no longer has authority to order their release from detention.

b) National Risk Assessment for Detention

52. Throughout the class period, the CBSA has used the National Risk Assessment for Detention (NRAD) process to support and document the initial detention placement decision as well as subsequent decisions on the location of detention. The NRAD process assesses an individual's risk level for detention placement purposes every 60 days. The process considers behaviour, detention grounds, whether identity has been confirmed, inadmissibility, criminal convictions, mental health issues, the need for ongoing medical care, and vulnerability factors (including physical or mental disabilities).

53. At the beginning of the class period, a high or medium risk level would result in detention in a provincial or territorial correctional facility (absent suitable alternatives to detention). Over time, IHCs could accommodate individuals assessed as medium risk. Persons with physical or mental disabilities are considered vulnerable persons to whom, if no other risk factors apply, a low risk applies. As of 2016, the presence of suspected or known untreated mental health issues has expressly been identified as a mitigating vulnerability factor which, if present, decreases the likelihood of placement in a provincial or territorial correctional facility. A low or decreased risk level may result in placement or transfer to an IHC or a recommendation for release. The NRAD process also includes a regular assessment of the detainee's medical needs. NRAD training is mandatory and compliance with the NRAD process is periodically audited by the CBSA.

54. Detainees are given an opportunity to provide input on the NRAD and are provided with a copy of the completed NRAD form. Immigration detainees can also request a transfer to another facility. Decisions regarding place of detention are reviewable by the Federal Court by way of judicial review.

55. All detention placement decisions are reviewed by either a second CBSA officer, or a CBSA manager. These reviews must take into account the individual circumstances of the detainee.

c) CBSA Long Term Detention Committee and Detention Governance Process

56. From before the proposed class period, the CBSA Long Term Detention Committee (the Committee), has regularly reviewed all cases in the Greater Toronto Area where persons are detained over 90 days.

57. The Committee reviews cases to ensure that detention is continued only when it is the only viable option. The Committee assesses whether all possible enforcement action has been taken and whether alternatives to detention would be appropriate, such as release on terms and conditions. The Committee can recommend transfers to alternative facilities to facilitate specific treatment, supervision in the community, release, or further file review to the CBSA hearings officer assigned to appear before the Immigration Division.

58. Since January 2017, a Detention Governance Process that applies the best practices of the Long Term Detention Committee has also been in place across Canada. CBSA managers of each region regularly review all detention cases of 60 days or more to determine whether or not all alternatives to detention or transfer options have been exhausted. These Managers report to a Regional Review Committee, which in turn reports to CBSA Headquarters, Inland Enforcement Operations on all detention cases of 99 days or more. At each step, consideration is given to whether all alternatives to detention have been exhausted and to ensure that efforts to facilitate removal are continuing.

3) <u>Detention Monitoring</u>

59. Canada has signed a Memorandum of Understanding with the Canadian Red Cross (CRC) with respect to the monitoring of detention conditions, and has a Protocol with the

United Nations High Commission for Refugees (UNHCR) permitting site visits and UNHCR interaction with refugee claimants. Both agencies monitor conditions of detention for immigration detainees in correctional facilities across the country.

60. Throughout the class period, CBSA Detention Liaison officers and other CBSA officers have had regular access to detainees in provincial institutions for the purposes of carrying out their functions under the *IRPA* and have acted as a liaison between the detainees and institutions, and the CBSA.

G. DETENTION STANDARDS

61. The CBSA, under the authority of the *IRPA,* has policies in place governing detention standards, including the CBSA's National Detention Standards, in place since 2002 and most recently updated in 2021. The National Detention Standards govern, among other things, classification and placement of immigration detainees, and detention in non-CBSA facilities. For persons detained at a non-CBSA facility, the specific detention standards in place are guided by statute, the policies and rules of each facility, and the terms of signed agreements.

H. NO LIABILITY UNDER THE *CHARTER*

62. The plaintiffs have alleged that their treatment in the relevant time period was contrary to sections 7, 9, 12 or 15 of the *Charter*. Their allegations focus on their placement in provincial correctional facilities for some or all of their *IRPA* detention, rather than in IHCs. Canada denies that the placement of the plaintiffs in provincial correctional facilities was contrary to the proposed Class or Subclass Members' sections 7, 9 12 or 15 *Charter* rights and puts the plaintiffs to the strict proof thereof.

63. Alternatively, if the treatment of the proposed Class or Subclass Members' *Charter* rights was contrary to their *Charter* rights, as alleged, any such breach is justified under Section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society.

1) <u>No Breach of Section 7</u>

64. The proposed Class or Subclass Members' rights to liberty under section 7 of the *Charter* are engaged by their detention on immigration grounds.

65. Canada denies that the CBSA's decision to place a detainee in a provincial correctional facility, as opposed to IHCs or other facilities, constitutes a discrete engagement of the detainee's residual section 7 rights. Once an individual is detained on immigration grounds, CBSA officials follow the NRAD process to decide – in a fair and rational manner – on the appropriate kind of facility for that person's detention. This decision admittedly impacts the degree of liberty that each detainee will experience, with provincial correctional facilities typically being more restrictive. But the section 7 right to liberty does not mean that immigration detainees have an entitlement or right to be held in an IHC by default.

66. Canada denies that the detention of the plaintiffs on immigration grounds, including their placement in provincial correctional facilities, engaged their section 7 right to security of the person. Detention in a correctional facility does not categorically or inherently limit the right to security of the person.

67. In any event, Canada denies that any of its actions or omissions limited the proposed Class or Subclass Members' right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice as protected by section 7 of the *Charter*. By definition, the proposed class consists of individuals whose liberty interests were lawfully curtailed by operation of the provisions of the *IRPA*. The proposed Class or Subclass Members' section 7 *Charter* rights were not infringed by reason of their placement or transfer to provincial correctional facilities.

68. The CBSA's use of provincial and territorial correctional facilities is neither arbitrary nor overbroad. The NRAD as well as CBSA's operational manual and policies, advance the CBSA's objective - to arrange the safe and secure detention of persons subject to detention under the *IRPA* – in a rational way. The NRAD process is administered in a procedurally fair way.

69. Canada denies that the CBSA's use of provincial and territorial correctional facilities is grossly disproportionate to the CBSA's objective and relies on its pleadings, below, in response to the alleged section 12 breach, in that regard.

70. Alternatively, if any of the Class members' section 7 *Charter* rights were engaged and limited as plead, which the defendant denies, the defendant says that any infringement was demonstrably justified in a free and democratic society and hence saved by section 1 of the *Charter*.

2) No Breach of Section 9

71. A lawful detention is not arbitrary within the meaning of section 9 of the *Charter* unless the law authorizing the detention is itself arbitrary. The defendant denies that Division 6 of the *IRPA* or Division 14 of the *Regulations*, which authorize and constrain the CBSA's detention powers, are arbitrary.

72. The detention of the proposed Class members is governed by standards that are rationally related to the purpose of the power of detention. Immigration detention is statutorily authorized, and the criteria for detention in a correctional facility narrowly defines the group of immigration detainees who can be detained there. In addition, there are mechanisms in place for fair and periodic review of a detainee's detention, including review of decisions regarding placement.

73. The defendant denies that any of its practices with regard to the placement of immigration detainees violated section 9 of the *Charter*.

74. Alternatively, if any of the proposed Class members' section 9 *Charter* rights were engaged and limited as plead, which the defendant denies, the defendant says that any infringement was demonstrably justified in a free and democratic society and hence saved by section 1 of the *Charter*.

3) No Breach of Section 12

75. Immigration detention does not constitute punishment under section 12 of the *Charter*. Section 12 is engaged by either a treatment or punishment; if a measure can be

characterized as both that does not change the analysis. Further, in order for a measure to be defined as "punishment" for the purpose of the *Charter*, the first threshold requirement is that it be a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence. Therefore, detention that is carried out for administrative reasons and outside of a criminal procedure cannot amount to a "punishment", regardless of the restrictiveness of that detention in a person's case.

76. Canada denies that the placement of Class members in provincial correctional facilities, as opposed to IHCs or other facilities, constitutes cruel and unusual treatment or punishment contrary to section 12 of the *Charter*. Canada denies that conditions in provincial correctional facilities, which conditions vary from province to province and institution to institution, constitute cruel and unusual treatment or punishment. Canada denies that any of its actions or omissions subjected the Class or Subclass Members to cruel and unusual treatment or punishment contrary to section 12 of the *Charter*.

77. Further, whether treatment or punishment is grossly disproportionate, or so excessive as to outrage standards of decency, are fact and circumstance-specific determinations, which cannot be determined on a systemic or collective basis.

78. Alternatively, if any of the Class members' section 12 *Charter* rights were engaged and limited as pleaded, which Canada denies, Canada says that any infringement was demonstrably justified in a free and democratic society and hence saved by section 1 of the *Charter*.

4) <u>No Breach of Section 15</u>

a) On the basis of mental disability

79. Canada denies that any of its actions or omissions breached the Class Members' rights under section 15 of the *Charter*. Canada denies that its actions resulted in a distinction between the Class Members and others on the basis of an enumerated or analogous ground or that any such distinction amounted to discrimination (for example, because it perpetuated a disadvantage or stereotype).

80. The placement of proposed Class members in provincial correctional facilities is based on a number of objective factors. Placement decisions are based on a holistic assessment of a detainee's individual circumstances, and the intent is to hold a detainee in an IHC if their particular risks (to themselves or others) can be safely addressed in an IHC. Mental health issues are addressed in the process, but the process does not lead to systemic distinctions on the basis of mental disability or illness.

81. In the alternative, if the plaintiffs are able to provide sufficient evidence so as to demonstrate a systemic distinction of this nature, there is no discrimination in this context. Placement decisions have a rational connection to the capacities of the different kinds of facilities (in terms of ensuring the safety of the detainee and others) and the kinds of medical care that are available in each facility.

b) On the basis of citizenship

82. Differential treatment between citizens and non-citizens in immigration matters is contemplated by the *Charter* and is not discriminatory.

83. More particularly, Canada denies that the *IRPA* detention scheme discriminates against non-citizens as compared to citizens. The *IRPA* detention scheme applies only to non-citizens. The distinction at issue is therefore non-citizens subject to detention and other non-citizens.

84. The proposed Class or Subclass Members were detained pursuant to a constitutionally compliant detention scheme. The scheme does not perpetuate prejudice or disadvantage to non-citizens, or impose a disadvantage based on stereotypes. Non-citizens are not automatically detained. The proposed Class or Subclass Members were not, solely by virtue of being non-citizens, automatically placed in provincial or territorial correctional facilities. Pursuant to Canada's policies and practices, CBSA's detention placement decisions are guided by an individualized assessment of the appropriate facility to safely and securely effect detention under the *IRPA*. Relying on provincial and territorial correctional facilities is some situations is a rational policy choice that is properly circumscribed and governed by CBSA policies such as the NRAD.

85. Alternatively, if the proposed Class or Subclass Members' section 15 *Charter* rights were limited as alleged, which the defendant denies, any limitation was demonstrably justified in a free and democratic society and hence saved by section 1 of the *Charter.*

I. NO NEGLIGENCE

1) Crown immunity for core policy decisions

86. Canada's reasonable policy choices with respect to the immigration detention system are immune from claims in negligence.

87. Canada's practice of placing immigration detainees in provincial facilities was the product of the Government's core policy decision about the scope of the immigration holding centre program. Canada's choice of which facilities to use to detain immigration detainees, and its agreements with provincial and territorial authorities for the use of provincial and territorial correctional institutions involve the allocation of government resources and policy choices, which are dictated by financial, economic, social and political factors and constraints, and which are immune from a claim in negligence.

88. Canada's oversight of agreements with provincial and territorial authorities for the use of provincial and territorial correctional institutions also involves policy decisions, which are immune from a claim in negligence.

89. Canada at all times made policy choices in a *bona fide* and reasonable manner.

2) <u>No liability for actions pursuant to statutory authority</u>

90. Pursuant to section 8 of the *Crown Liability and Proceedings Act*, the Crown is not liable when the act or acts complained of are committed under statutory authority. Canada and its agents, servants and employees were at relevant times acting pursuant to statutory authority.

3) <u>No duty of care owed</u>

91. Canada's agents, servants and employees did not owe a private law duty of care to individuals detained under the statutory authority of the *IRPA* at provincial or territorial correctional facilities. To find otherwise would undermine the Canada's ability to

administer the *IRPA*. If a duty of care is found, which is not admitted but denied, it is negated as a result of important policy considerations.

4) <u>No breach of a duty of care</u>

92. In the alternative, if a duty of care is found, Canada met the reasonable standard of care required in the circumstances.

93. Neither Canada nor any person acting on its behalf committed any torts or was negligent as alleged in the claim or at all.

94. Canada and its agents, servants, and employees at all times discharged their duties in a *bona fide*, proper, reasonable, prudent and conscientious manner and in accordance with the policies, programs, procedures and practices in place from time to time and, in at all material times, met and maintained a reasonable standard of care.

95. If Canada is found to have owed a duty of care and was in breach of such a duty, both of which are denied, and if the Class or Subclass Members suffered any loss, injury, or damage, which is also denied, such loss, injury or damage was not caused or contributed to by any negligence, breach of any duty, or want of care on the part of Canada or any person for whom Canada is responsible in law.

96. Canada also specifically denies the plaintiffs' allegations respecting systemic negligence. At all material times, Canada and its employees, agents and servants met the standard of care reasonably expected in the context of administering the *IRPA* and the

immigration detention system. Canada did not create, perpetuate or allow to develop a system that amounted to systemic negligence.

J. NO BREACH OF FIDUCIARY DUTY

97. Canada denies the existence of a fiduciary duty in this matter. Canada did not undertake to act as a fiduciary on behalf of the proposed Class or Subclass, nor does such an undertaking arise from the *IRPA*. The establishment of an *ad hoc* fiduciary duty is not appropriate given the proposed Class or Subclass Members' relationship with Canada. The provisions of the *IRPA* outline broad public policy goals to benefit society at large that conflict with a duty to put the proposed Class or Subclass Members' interests first.

98. The alleged vulnerability of the Class Members, without more, does not give rise to a fiduciary duty.

K. CLAIMS BEYOND LIMITATION PERIOD ARE STATUTE BARRED

99. All claims alleged in the statement of claim arising more than six years prior to the date of the statement of claim are statute-barred. In this regard, Canada pleads and relies upon the *Crown Liability and Proceedings Act*, RSC 1983, c C-50.

100. Class and Subclass Members whose detention started before the start of the proposed class period, were aware of any of the claims raised against Canada in this action, on the date on which their detention in a provincial correctional facility commenced. The claims of any such class members are therefore statute-barred.

L. RESPONSE TO PLEADINGS RELATED TO INTERNATIONAL LAW

101. With respect to paragraphs 50 and 51, the defendant acknowledges that some of the pleaded statements appear in the International instruments referred to but denies they are applicable to or determinative of any of the alleged failures. Canada denies that it is in contravention of any of its international obligations.

102. Canada's immigration detention policy complies with its binding international legal obligations and is consistent with non-binding international guidelines and best practices related to immigration detention that have been adopted by nation states.

103. Canada pleads and relies on its pleadings on the alleged *Charter* breaches in response to alleged breaches of international customary norms that are equivalent to protected rights under the *Charter*. Any departure from Canada's treaty obligations, or non-binding international practices, which is denied, does not give rise to a cause of action in this Court.

M. NO DAMAGES WARRANTED

104. Canada denies that the Class or Subclass Members suffered damages as alleged and puts the plaintiffs to the strict proof thereof.

105. In the alternative, if the Class or Subclass Members suffered any damages, the members of the Class or Subclass caused and/or contributed to their own injury and damages and failed to mitigate their damages. The actions of Canada, its employees,

agents or servants did not cause or materially contribute to any injuries or damages claimed by the plaintiffs.

106. The Class and Subclass Members are not entitled to the damages sought as the damages are unforeseeable, not causally connected, grossly exaggerated, excessive and remote.

107. An award of damages would not constitute an appropriate or just remedy under subsection 24(1) of the *Charter* in the circumstances. Further, the claim for subsection 24(1) damages is premised on particular *Charter* violations in individual circumstances which cannot reasonably be assessed in the aggregate or in a factual vacuum based on a series of generalized allegations of misconduct.

1) <u>No basis to awarded aggregate damages</u>

108. An award of aggregate damages is not appropriate on the facts of this claim.

109. In the event that Canada is found liable for damages, any fair assessment of damages will be inextricably linked to factual and legal issues specific to individual class members, including, but not limited to:

(a) Causation;

(b) Mitigation;

(c) Application of the *Crown Liability and Proceedings Act*;

(d) Discoverability;

(e) Capacity of the class member;

(f) The class member's membership in other class proceedings involving detention in correctional facilities during the class period; and

(g) The nature of any treatment experienced by individual class members.

110. Damages cannot reasonably be calculated without proof by individual class members.

111. In response to paragraph 124 of the Statement of Claim, time spent in correctional facilities will be insufficient to determine whether the proposed class members can pursue the claims made in this proposed class proceeding or to determine the period during which damages should be assessed.

2) <u>No liability for punitive damages</u>

112. There is no basis for an award of punitive, aggravated or exemplary damages. Neither Canada nor any of its servants, agents or employees has acted in a high-handed, malicious, arbitrary or highly reprehensible manner.

113. The defendant specifically pleads and relies on the following statutes and regulations made thereunder:

(a) *The Constitution Act, 1867,* 30 & 31 Vict, c 3;

(b) *Immigration and Refugee Protection Act*, SC 2001, c 27;

(c) *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

(d) *Interpretation Act*, RSC 1985, c I-21; and,

(e) *Negligence Act*, RSO 1990, c N1.

N. CONCLUSION

114. The AGC requests that this action be dismissed, with costs.

Date: January 30, 2023

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(Short title of proceeding)

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
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